

1 CIVIL DISTRICT COURT  
2 PARISH OF ORLEANS  
3 STATE OF LOUISIANA  
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7 GLORIA SCOTT AND \*  
8 DEANIA JACKSON, \*  
9 \* NO. 96-8461  
10 VERSUS \* DIVISION "I"  
11 \* SECTION 14  
12 THE AMERICAN TOBACCO \*  
13 COMPANY, INC., ET AL. \*

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17 Transcript of proceedings before the  
18 Honorable Richard J. Ganucheau, Judge Pro Tempore,  
19 Civil District Court, Parish of Orleans, State of  
20 Louisiana, 421 Loyola Avenue, New Orleans, Louisiana  
21 70112, commencing on June 18, 2001.

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\* \* \* \* \*

Monday Morning Session

May 12, 2003

9:40 a.m.

\* \* \* \* \*

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1 I N D E X  
2 Witness Page  
3 ROBIN DALE KINSER  
Deposition by reading 20537  
4  
PHIL FISHER  
5 Deposition by videotape 20561  
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20487

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20488

1 A P P E A R A N C E S (Continued)

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15 at 20400 at lines 15 through 25.  
16 I have received a memorandum in  
17 support of the motion for a mistrial over

18 the signature of Mr. Richardson and other  
19 defense counsel named.

20 Mr. Richardson, good morning.

21 MR. RICHARDSON:

22 Good morning.

23 THE COURT:

24 Has a pleading been filed entitled  
25 Motion for Mistrial?

26 MR. RICHARDSON:

27 No, Your Honor. That was simply our  
28 bench brief in support of the oral  
29 motion.

30 Did Your Honor believe we should also  
31 file an actual motion? Because I could do  
32 that, if you like.

20490

1 THE COURT:

2 It's your motion, counsel.

3 MR. RICHARDSON:

4 I believe that the oral motion that  
5 Mr. Sholes made is our motion for  
6 mistrial. That's the memorandum in  
7 support of it per the Court's direction on  
8 Thursday afternoon.

9 THE COURT:

10 And I indicated that I would hear the  
11 argument on the motion and the opposition  
12 this morning.

13 Are defendants ready to proceed to  
14 argue in support of that motion?

15 MR. WITTMANN:

16 Yes, we are, Your Honor.

17 THE COURT:

18 Are plaintiff counsel ready to  
19 respond?

20 MR. MURRAY:

21 Yes, Your Honor.

22 THE COURT:

23 All right. I will hear the arguments  
24 in support of the motion.

25 MR. WITTMANN:

26 Thank you, Your Honor.

27 Judge, this is a case in which  
28 sympathy and prejudice have always been a  
29 concern for the defendants.

30 On one side we have a class of people  
31 who claim they just want some medical  
32 tests and a chance to break the chains of

20491

1 addiction.

2 On the other side, we have big  
3 tobacco, the pejorative term that is most  
4 frequently invoked by plaintiffs counsel.

5 The potential for sympathy and  
6 prejudice in this case is truly enormous,  
7 and the plaintiffs have done everything in  
8 their power to exploit that potential.

9 They have accused the chief executive  
10 officers of the tobacco companies of lying  
11 to the public.

12 They have suggested to the jury that  
13 one of the defense experts, Dr. Viscusi,  
14 thought they were ignorant and not able to

15 understand the issues in this case.

16 They have repeatedly suggested to the  
17 jury that the defendants are responsible  
18 for killing hundreds of thousands of  
19 Americans in a callous and deliberate  
20 fashion.

21 The defendants from the outset have  
22 struggled to prevent sympathy and  
23 prejudice from clouding the issues in this  
24 case.

25 Over a year ago we filed a motion to  
26 exclude all evidence concerning personal  
27 opinions of counsel from the case, and  
28 plaintiffs counsel stipulated that they  
29 would not comment on, quote, the  
30 credibility of any defendant or their own  
31 personal experiences or opinions, closed  
32 quote.

20492

1 The Court granted our motion, and  
2 plaintiffs counsel were well aware of what  
3 Your Honor expected of them during the  
4 course of this trial.

5 They even told Your Honor they didn't  
6 need to be told what to do and not do in  
7 conducting the issues in this trial,  
8 presenting the evidence to the jury; that  
9 they were all experienced trial lawyers  
10 and knew what they were doing.

11 And I submit that's actually correct,  
12 Judge. I agree with them.

13 Yet during the course of this trial,  
14 plaintiffs counsel have repeatedly  
15 disregarded their stipulation and ignored  
16 Your Honor's order.

17 Throughout February --

18 THE COURT:

19 Mr. Wittmann, let me indicate to you  
20 what I am interested in. I'm interested  
21 in the events of Thursday afternoon which  
22 gave rise to Mr. Sholes' motion for  
23 mistrial at page 20400 of the record.  
24 That's what I'm hearing.

25 I know the history. I know the  
26 acrimony and the motions that have been  
27 flying both ways in this case.

28 But what you are talking about now  
29 has no bearing on what I have to decide  
30 today. I am going to decide today whether  
31 to grant or deny Mr. Sholes' motion for a  
32 mistrial based on the questions asked by

20493

1 Mr. Bencomo of the witness on Thursday  
2 afternoon.

3 MR. WITTMANN:

4 I appreciate that, Your Honor. I  
5 apologize for going on too long with the  
6 background, but I thought some was  
7 necessary.

8 THE COURT:

9 By the way, I read your memorandum.

10 MR. WITTMANN:

11 Thank you, Judge.

12 Just last week Mr. -- to bring it  
13 up-to-date, Your Honor warned, and I  
14 quote, that mistrial is concomitant with  
15 cumulative stuff.

16 That warning was issued on Wednesday,  
17 May 7th, and Your Honor's warning was  
18 ignored.

19 The very next day, Thursday, May 8th,  
20 plaintiffs counsel made remarks that were  
21 loud enough to be heard by the jury during  
22 Dr. Townsend's testimony, and engaged in  
23 the gestures and the head-shaking for  
24 which they had already been admonished by  
25 the Court, and the Court reemphasized its  
26 earlier warnings just before lunch.

27 And I think what Your Honor actually  
28 said at that time is important, Judge.  
29 You said, and I quote:

30 Everybody in this courtroom is aware  
31 of the evidence. Body language is not  
32 allowable, gestures and facial gestures

20494

1 and other antics such as laughter and  
2 smirking is not allowed, and if I see it  
3 done, I'm going to impose some penalties.

4 And it's a terrible word, but  
5 mistrial is not out of the question if it  
6 continues. And I recognize what a blow  
7 that would be to both sides, but I'm here  
8 to give a fair trial. And if it continues  
9 and it's blatant and I think it gets to  
10 that point, I won't hesitate. Closed  
11 quote.

12 It's hard for me to imagine a  
13 stronger warning than the warning you gave  
14 last Thursday. But your warning was  
15 ignored almost immediately.

16 Just after lunch, plaintiffs counsel  
17 flagrantly violated Your Honor's order  
18 with the following series of questions to  
19 Dr. Townsend.

20 Question: You are aware, are you  
21 not, of the CDC's statistics that show  
22 that four hundred thousand -- four hundred  
23 thousand Americans die each year as a  
24 result of cigarette smoking; is that not  
25 correct, sir?

26 Answer: I have seen some various  
27 statistics. That's one of them.

28 Question: And you have seen  
29 statistics, have you not, that the CDC,  
30 the Centers for Disease Control, shows  
31 also that over ten thousand of our  
32 citizens here in Louisiana die as a result

20495

1 of smoking products such as yours and  
2 those of the defendants; is that not  
3 correct, sir?

4 Answer: I don't know that.

5 Question: You don't know how many  
6 people your company has killed in  
7 Louisiana; is that correct?

8 The objection was sustained.

9           Question: Sir, did you ever meet my  
10          father?

11          Now, with this line of questioning,  
12          Judge, plaintiffs counsel not only accused  
13          R. J. Reynolds of killing people in  
14          Louisiana, a clear violation of the  
15          stipulation of the order prohibiting  
16          comments on culpability, but he injected  
17          his own personal experiences into the case  
18          by leading the jury to believe that R. J.  
19          Reynolds also killed his father.

20          I respectfully submit to the Court  
21          that plaintiffs counsel has engaged in  
22          prejudicial misconduct. It can't be cured  
23          by any instruction.

24          In the eyes of this jury, my client  
25          is now a killer of ten thousand Louisiana  
26          citizens every year, according to  
27          plaintiffs counsel, including  
28          Mr. Bencomo's father.

29          Plaintiffs counsel are well aware  
30          that one juror's father or former smoker  
31          died of cancer, as did the mother of  
32          another juror.

20496

1          Plaintiffs counsel questioned some of  
2          these jurors in voir dire. There can be  
3          no doubt that his questions were an  
4          attempt to evoke the sympathy and emotions  
5          of these jurors and cause them to think of  
6          their personal loss rather than the issues  
7          in this case.

8          Now, throughout the case, Judge,  
9          plaintiffs counsel have gone to great  
10         pains to paint big tobacco as the Evil  
11         Empire. They have apparently felt that,  
12         despite Your Honor's warnings, they can  
13         say whatever they want about big tobacco  
14         and get away with it.

15          And although the Court has prohibited  
16          any evidence regarding the cause of  
17          Ms. Scott's lung cancer or her prognosis  
18          because of its prejudicial impact, we now  
19          have Mr. Bencomo's father injected into  
20          this case as a victim.

21          It's truly a disaster for this case  
22          to end in a mistrial, but Your Honor did  
23          your best to stop it, the defendants did  
24          their best to stop it, and the plaintiffs  
25          owe only themselves to blame.

26          Their arrogance, their disregard of  
27          our stipulation, and their contempt of  
28          Your Honor's orders got us here. And I  
29          urge you to do what a trial judge must do  
30          in this situation, which is to declare a  
31          mistrial.

32          The plaintiffs have poisoned the well

20497

1          in this case by their conduct, by their  
2          efforts to inflame the jury in a case in  
3          which personal injury and wrongful death  
4          are not even an issue.

5          They are seeking medical testing for

6 people with no symptoms of disease, but  
7 their focus has portrayed the defendants  
8 as killers who have even had a hand in  
9 killing the parent of one of the  
10 plaintiffs lawyers.

11 As Mr. Sholes urged last week, Your  
12 Honor, somebody has got to stop them.  
13 Unfortunately they weren't stopped before,  
14 and now it's too late. And the defendants  
15 respectfully move, Your Honor, for a  
16 mistrial in in this case.

17 THE COURT:

18 Do you wish to put any evidence into  
19 the record in support of your motion on  
20 behalf of defense counsel, Mr. Wittmann?

21 MR. WITTMANN:

22 Your Honor, I know of no evidence  
23 that we could introduce into the record  
24 other than what's happened frankly. So,  
25 no, the answer to the question is no.

26 THE COURT:

27 All right. Any other argument in  
28 support of the motion?

29 Response?

30 MR. MURRAY:

31 Good morning, Your Honor. Stephen  
32 Murray for the plaintiffs' legal  
20498

1 committee.

2 Your Honor, I'm certainly not here to  
3 argue the propriety of the question that  
4 was asked. The question was asked, there  
5 was an objection made, and Your Honor  
6 ruled.

7 But within the context of the motion  
8 for a mistrial, I think it is fair to put  
9 the question into some perspective.

10 Your Honor, it was counsel for RJR  
11 that put the skunk in the jury box, to  
12 borrow a term from Mr. Belasic. In  
13 opening statement, Mr. Wittmann told the  
14 jury that the reason we are here is  
15 because of plaintiffs' counsel desire to  
16 make a lot of money on this case, or words  
17 to that effect.

18 It was a question -- it was a  
19 statement to the jury that was certainly  
20 outside the record of any proof that would  
21 be offered in this case. It was a  
22 statement made to prejudice the jury  
23 against plaintiffs counsel and to make  
24 this case into a case of greed rather than  
25 a case to be decided on the issues.

26 Your Honor, when counsel goes outside  
27 the record to make that suggestion to the  
28 jury, there is no way for us to respond  
29 within the record. But it is important,  
30 we believe, that the jury --

31 THE COURT:

32 Tell me what you meant by that last  
20499  
1 statement, when counsel goes outside the  
2 record?

3 MR. MURRAY:

4 Your Honor, counsel attempted to  
5 influence the jury by making a statement  
6 that would not be supported by evidence  
7 introduced in the case, that could not be  
8 responded to by evidence within the case,  
9 and could only be responded to in a  
10 rhetorical fashion.

11 Whether that's proper or improper is  
12 for Your Honor to decide.

13 THE COURT:

14 You are speaking of Mr. Bencomo's  
15 last question that prompted the motion for  
16 a mistrial?

17 MR. MURRAY:

18 Yes, Your Honor.

19 Your Honor, the purpose of the  
20 question was not to influence the jury  
21 with respect to sympathy, but rather to  
22 respond to the suggestion that we are  
23 here -- we, plaintiff counsel, are here  
24 out of greed, and to suggest that there  
25 are other reasons why we may be here.

26 And there are other reasons why we  
27 are here, Judge, for each and every one of  
28 us.

29 I mean, when I got involved in  
30 tobacco litigation in 1992, no plaintiff  
31 lawyer had ever gotten a nickel out of the  
32 tobacco industry. When the Scott case was

20500

1 filed, no plaintiff lawyer had ever  
2 received a nickel from the tobacco  
3 industry.

4 Many of us, Judge, were motivated not  
5 by a desire to make money, but to hold  
6 accountable an industry that had skated  
7 and had had no responsibility for an  
8 intolerable situation.

9 That's why we are here, and I think  
10 it's fair for us to make that point to the  
11 jury by a rhetorical question.

12 This was not the first rhetorical  
13 question asked in this case by either  
14 side.

15 Your Honor, this is a lengthy trial.  
16 With respect to the prior motions of  
17 defense counsel that Mr. Wittmann suggests  
18 should somehow cumulatively bring about a  
19 mistrial, none of those were supported by  
20 the record. They were simply allegations,  
21 charges made by defense counsel trying to  
22 provoke a mistrial.

23 We contested each of those  
24 accusations. We don't believe that our  
25 conduct has been outside of what's to be  
26 expected of responsible and professional  
27 counsel.

28 But Your Honor, we are human. When  
29 we hear a ludicrous statement from a  
30 witness on the stand, sometimes it's  
31 difficult not to have -- difficult not to  
32 have at least some response, as much as we

1 might want to guard against it.

2 Your Honor, this motion for mistrial  
 3 would not be, as Mr. Wittmann suggests, a  
 4 disaster for both sides. It would benefit  
 5 and profit only the defendants.

6 This is an unusual case, Your Honor.  
 7 Protracted litigation has an equalizer in  
 8 most cases, and that's prejudgment  
 9 interest, so the delays tend to be evened  
 10 out by that factor.

11 But in this case, Your Honor, since  
 12 the relief we seek is injunctive, there is  
 13 not likely to be prejudgment interest, and  
 14 in fact, Your Honor, the class is  
 15 shrinking every day. Delay benefits  
 16 nobody but the defendants.

17 And the other thing I would like to  
 18 remind Your Honor of is that Mr. Bencomo's  
 19 intent to respond to Mr. Wittmann's  
 20 characterization of our motivation was  
 21 made clear to the Court during the  
 22 questioning of Mr. Townsend on his  
 23 qualifications, and the response of  
 24 defense counsel and the response of the  
 25 Court was, well, but that's not an issue  
 26 for qualifications.

27 So Mr. Bencomo withdrew the question,  
 28 but indicated his intent to follow up on  
 29 it in cross-examination.

30 Now, Your Honor, he made the attempt,  
 31 Your Honor ruled, and the -- the  
 32 defendants objected and Your Honor ruled.

1 But let me talk about prejudice for a  
 2 minute, Your Honor, because what the  
 3 defendants seek is a drastic remedy. They  
 4 seek to derail a trial that has been very  
 5 protracted, very expensive for both sides,  
 6 and required a tremendous investment of  
 7 Court resources and imposition on the  
 8 resources of the entire judicial system.

9 What's the prejudice, Your Honor?  
 10 The prejudice is that somehow Mr. Bencomo  
 11 has communicated a message to the jury  
 12 that he lost a loved one to tobacco.

13 Your Honor, the jury knows that four  
 14 hundred thousand people a year die from  
 15 the use of cigarettes. That's really not  
 16 in dispute. They know that tens of  
 17 thousands of Louisiana citizens get sick  
 18 and die on an annual basis. That's not in  
 19 dispute.

20 Many of them have lost -- some of  
 21 them have lost loved one. They listened  
 22 to other jurors through the voir dire  
 23 process describe their loss of loved  
 24 ones.

25 Where is the prejudice? What  
 26 information did Mr. Bencomo impart to this  
 27 jury that they weren't already well aware  
 28 of? The drastic remedy that they seek is  
 29 not warranted.

30                   Finally, Your Honor, for us to use  
31                   the term kill to describe what cigarettes  
32                   do to the consumers who use them and to

20503

1                   describe the risk at which those consumers  
2                   are put for which we seek medical  
3                   monitoring and cessation benefits is a  
4                   fair comment on the evidence, and we make  
5                   no apology for the use of that term.

6                   If the Court tells us don't use it,  
7                   we won't. But we think it's very well  
8                   supported by the evidence in this case.

9                   There is no significant prejudice to  
10                  the defendants. The motion for mistrial  
11                  should be denied.

12                  THE COURT:

13                  Rebuttal?

14                  MR. MURRAY:

15                  Excuse me, would Your Honor indulge  
16                  me?

17                  Your Honor, just this last point. If  
18                  the personalization of this issue has been  
19                  created by a question that went unanswered  
20                  and to which Your Honor immediately  
21                  sustained an objection, then we would  
22                  suggest that the more appropriate remedy  
23                  to a mistrial would be to instruct the  
24                  jury that they should disregard whatever  
25                  we said.

26                  THE COURT:

27                  Well, what are you suggesting? That  
28                  I read the question back and tell them  
29                  that the objection was sustained, and ring  
30                  the bell again?

31                  MR. MURRAY:

32                  Your Honor --

20504

1                  THE COURT:

2                  I hope not. It seems like --

3                  MR. MURRAY:

4                  I wouldn't recommend that. I'm just  
5                  saying that it is as an alternative. If  
6                  the defendants feel somehow that they have  
7                  been prejudiced to say that bell can't be  
8                  unrun, then I think that's the preferable  
9                  remedy than to declare a mistrial after 18  
10                 weeks of trial.

11                 Your Honor, lawyers in lawsuits make  
12                 judgments on behalf of their advocacy, and  
13                 if every time one of us makes a judgment  
14                 it derails a trial, we would never  
15                 complete difficult trials.

16                 That's why the law is so clear that  
17                 mistrial is the remedy of last resort only  
18                 for the most extreme cases and only where  
19                 the prejudice is so great that it's the  
20                 only possible way to deal with the  
21                 difficulty.

22                 Here I suggest there is no prejudice  
23                 because the jury well knows all of the  
24                 facts that were implied, although not  
25                 stated, by that question.

26                 MR. WITTMANN:

27           Your Honor, may I have a brief  
28        rebuttal?

29           MR. RUSS HERMAN:

30           Excuse me just one second. Excuse  
31        me, Mr. Wittmann.

32           MR. MURRAY:

20505

1           Thank you, Your Honor.

2           MR. WITTMANN:

3           Your Honor, as I appreciate  
4        Mr. Murray's argument, he's not quibbling  
5        with us about the merits of the question  
6        that was asked, he says that plaintiffs  
7        counsel was asking a rhetorical question.

8           I submit to the Court that was not a  
9        rhetorical question. It was a question  
10      designed to elicit a fact.

11           So as I appreciate his argument, what  
12        they are now saying about the plaintiffs'  
13        lawyers not being motivated to make money  
14        and so forth, it seems to me his argument  
15        is that they are saying that those  
16        questions were intentioned, in fact,  
17        counsel wanted the jury to believe that  
18        Mr. Bencomo's father was killed by R. J.  
19        Reynolds Tobacco Company, and they wanted  
20        them to know that the lawyers are here to  
21        vindicate Mr. Bencomo's father.

22           That is totally improper, and now we  
23        know that it was both outside of the  
24        record and intentional.

25           All I said in my opening statement is  
26        that this case is about money, and it is  
27        the plaintiffs who want us to pay for  
28        smoking cessation and monitoring for a  
29        million plus people.

30           What the plaintiffs did here is to  
31        intentionally tell the jury a fact outside  
32        of the evidence, and did it in a way

20506

1        designed to elicit extreme prejudice  
2        against the defendants. It's part of the  
3        pattern we have been fighting, Your Honor,  
4        ever since this case started.

5           Your Honor warned just last just week  
6        that the consequences of this continued  
7        effort by the plaintiffs could result in a  
8        mistrial, and you called it yourself, and  
9        they ignored your warning.

10           We submit the remedy we seek is  
11        right.

12           THE COURT:

13           The cases hold -- and I am referring  
14        to a specific case called Searle,  
15        S-e-a-r-l-e, versus Travelers, 557  
16        Southern 2d 321, 557 Southern 2d 321, that  
17        motion for mistrial should be granted when  
18        I am convinced that prejudicial misconduct  
19        occurred during the trial which cannot be  
20        cured by an admonition or instruction to  
21        the jury.

22           I am also required by that -- by the  
23        suggested procedure set out in this case

24 that I need to state on the record my  
25 findings of fact and conclusions of law in  
26 ruling on the motion for a mistrial.

27 I don't know of any way that I can do  
28 that with any credibility without  
29 questioning these jurors.

30 It's my intention to question these  
31 jurors individually in the presence of  
32 counsel on the record.

20507

1 And the only person who can talk  
2 during that session will be myself and the  
3 juror, and I am going to ask the question  
4 of the juror whether anything occurred on  
5 last Thursday during the cross-examination  
6 of Dr. Townsend that has affected their  
7 ability to be a fair and impartial juror  
8 in the case.

9 That's the only way I can determine  
10 that nothing has occurred in the case that  
11 has destroyed the ability of these jurors  
12 to be fair and impartial in the case.

13 If the answer is negative, that ends  
14 the inquiry. And if the answer is  
15 positive, I may ask for an explanation.

16 And we are going to commence that in  
17 just a few minutes, as soon as I find some  
18 space in which to do that. I'm not sure  
19 whether we are going to do it in the  
20 courtroom or in the Judge's chambers.

21 But we are going to recess until  
22 10:15 by that wall clock and I will make  
23 the decision.

24 Anything for the record as a result  
25 of what I just said?

26 MR. MURRAY:

27 No, Your Honor.

28 MR. WITTMANN:

29 Nothing, Your Honor.

30 THE COURT:

31 Okay.

32 (A recess is taken at 10:07 a.m.)

20508

1 (In open court without a jury present  
2 at 10:16 a.m. :)

3 THE COURT:

4 As I told counsel in chambers, the  
5 procedure is going to be as follows.

6 I am going to summon each juror into  
7 the courtroom one at a time out of the  
8 presence of the other jurors. I will  
9 convert this courtroom to my chambers.

10 Plaintiffs will be allowed to have  
11 two trial counsel in the courtroom during  
12 this procedure. Each defendant will be  
13 allowed to have one trial counsel in the  
14 courtroom during this procedure.

15 I am going to question the jurors  
16 with regard to their ability to be fair  
17 and impartial in this case individually.  
18 After that, I will take a short recess.

19 Once I reach my decision on the  
20 motion, we will reconvene. I will

21 announce my decision, and we will proceed  
22 accordingly.

23 Any questions?

24 MR. WITTMANN:

25 No, Your Honor.

26 MR. RUSS HERMAN:

27 No, Your Honor.

28 THE COURT:

29 All right. Let's clear the  
30 courtroom. Let's have two counsel for  
31 plaintiffs side and one counsel for each  
32 defendant in the case.

20509

1 MR. RUSS HERMAN:

2 Do we have a minute for a bathroom  
3 break quickly?

4 THE COURT:

5 You have got a minute.

6 --- --

7 (In the courtroom as in chambers with  
8 Counsel Murray, Herman, Wittmann, Long,  
9 Gay and Schneider present. Each juror is  
10 called in separately.)

11 THE COURT:

12 Good morning, Mr. Forman.

13 JUROR FORMAN:

14 Good morning.

15 THE COURT:

16 I'm sure you remember when we were  
17 selecting this jury our goal was to find  
18 people who could be fair and impartial to  
19 both sides in this case?

20 JUROR FORMAN:

21 Yes, sir.

22 THE COURT:

23 You remember that?

24 JUROR FORMAN:

25 I remember.

26 THE COURT:

27 With that in mind, I have a question  
28 that I want to ask you and I want you to  
29 answer it. You are under oath.

30 JUROR FORMAN:

31 Okay.

32 THE COURT:

20510

1 Did anything occur in this trial on  
2 Thursday, May 8, which was last Thursday,  
3 during the cross-examination of Dr. David  
4 Townsend that has affected your ability to  
5 be a fair and impartial juror in this  
6 case?

7 JUROR FORMAN:

8 No.

9 THE COURT:

10 Yes or no, if you are able to?

11 JUROR FORMAN:

12 No, huh-uh.

13 THE COURT:

14 No?

15 JUROR FORMAN:

16 No.

17 THE COURT:

18           Thank you very much. Go back to the  
19       jury lounge. We will call you when we are  
20       ready to begin. Thank you.  
21           Good morning, Ms. Beo.

22           JUROR BEO:

23           Good morning.

24           THE COURT:

25           How are you today?

26           JUROR BEO:

27           I'm fine.

28           THE COURT:

29           I'm sure you remember when we were  
30       selecting the jurors, our goal was to find  
31       people who could serve as jurors in this  
32       case who could be fair and impartial to

20511

1       both sides. Do you remember that?

2           JUROR BEO:

3           Yes.

4           THE COURT:

5           With regard to that, I have a  
6       question to ask you. Did anything occur  
7       in this trial on Thursday, May 8, that was  
8       last Thursday, during the cross-  
9       examination of Dr. David Townsend that has  
10       affected your ability to be fair and  
11       impartial as a juror in this case?

12           JUROR BEO:

13           I can't think of anything that would  
14       have affected my judgment, no.

15           THE COURT:

16           Your ability to be fair and  
17       impartial?

18           JUROR BEO:

19           No.

20           THE COURT:

21           Okay. Thank you. Go on back to the  
22       jury room. We will call you when we are  
23       ready to begin.

24           JUROR BEO:

25           Okay.

26           THE COURT:

27           Thank you.

28           THE CLERK:

29           Mr. Bax.

30           THE COURT:

31           In the chair of honor, Mr. Bax, good  
32       morning.

20512

1           JUROR BAX:

2           Good morning.

3           THE COURT:

4           When we were selecting jurors in this  
5       case, I'm sure you will remember it was  
6       our goal to select jurors who could be  
7       fair and impartial to both sides in this  
8       case. Do you remember that?

9           JUROR BAX:

10           Right.

11           THE COURT:

12           With that in mind, I have a question  
13       to ask you. I would like you to answer  
14       yes or no if you are able to. Did

15 anything occur in this trial on Thursday,  
16 May 8th, which was last Thursday, during  
17 the cross-examination of Dr. David  
18 Townsend that has affected your ability to  
19 be a fair and impartial juror in this  
20 case?

21 JUROR BAX:

22 No.

23 THE COURT:

24 Thank you. Back to the jury room.  
25 We will call you when we are ready to  
26 start.

27 JUROR BAX:

28 All right.

29 THE CLERK:

30 Ms. Wright.

31 THE COURT:

32 Good morning.

20513

1 JUROR WRIGHT:

2 Good morning.

3 THE COURT:

4 Glad you are here.

5 I have a question I want to ask you,  
6 but I want to remind you of something  
7 before I do that.

8 Do you remember when we were picking  
9 the jurors in the case, it was our goal to  
10 pick people as jurors who could be fair  
11 and impartial to both sides. Do you  
12 remember that?

13 JUROR WRIGHT:

14 Uh-huh.

15 THE COURT:

16 With that in mind I want to ask you  
17 this question. Did anything occur in this  
18 trial on Thursday, May 8, which was last  
19 Thursday, during the cross-examination of  
20 Dr. David Townsend that has affected your  
21 ability to be a fair and impartial juror  
22 in this case?

23 JUROR WRIGHT:

24 No, it hasn't.

25 THE COURT:

26 Thank you. Go back to the jury  
27 lounge. We will call you when we are  
28 ready to start.

29 JUROR WRIGHT:

30 Okay.

31 THE CLERK:

32 Ms. Thomas.

20514

1 THE COURT:

2 Good morning.

3 JUROR M. THOMAS:

4 Good morning.

5 THE COURT:

6 I'm sure you remember when we were  
7 picking jurors for this trial, it was our  
8 goal to pick people as jurors who could be  
9 fair and impartial to both sides in the  
10 case. Do you remember that?

11 JUROR M. THOMAS:

12 Yes.  
13 THE COURT:  
14 With that in mind, I want to ask you  
15 a question. And answer with a yes or no  
16 if you can. Did anything occur in this  
17 trial on Thursday, May 8, which is last  
18 Thursday, during the cross-examination of  
19 Dr. David Townsend that has affected your  
20 ability to be a fair and impartial juror  
21 in this case?

22 JUROR M. THOMAS:

23 No.

24 THE COURT:

25 Thank you. Back to the jury lounge.  
26 We will call you when we are ready to  
27 start.

28 JUROR M. THOMAS:

29 Okay.

30 THE CLERK:

31 Ms. Janes.

32 THE COURT:

20515

1 Good morning.

2 JUROR JANES:

3 Good morning.

4 THE COURT:

5 I'm going to ask you a question which  
6 I would like you to answer with a yes or  
7 no after I tell you this.

8 You remember I'm sure when we were  
9 picking the jurors for this trial, it was  
10 our goal to pick people as jurors who  
11 could be fair and impartial to both sides  
12 in this case. Do you remember that?

13 JUROR JANES:

14 Yes.

15 THE COURT:

16 And with that in mind, I want to ask  
17 you a question, and answer it yes or no  
18 for me, please. Did anything occur in  
19 this trial on Thursday, May 8, which was  
20 last Thursday, during the cross-  
21 examination of Dr. David Townsend that has  
22 affected your ability to be a fair and  
23 impartial juror in this case?

24 JUROR JANES:

25 No.

26 THE COURT:

27 Thank you. Go back to the jury  
28 lounge and we will call you when we are  
29 ready to start.

30 THE CLERK:

31 Ms. Monroe.

32 THE COURT:

20516

1 Good morning, Ms. Monroe.

2 JUROR MONROE:

3 Good morning.

4 THE COURT:

5 Happy to have you here.

6 JUROR MONROE:

7 Happy to be here.

8 THE COURT:

9           Let me ask you a question after I  
10          tell you this. And I would like you to  
11          answer with a yes or no, please.

12          JUROR MONROE:

13          Okay.

14          THE COURT:

15          Do you remember when we were picking  
16          jurors in this case, it was our goal to  
17          pick people as jurors who could be fair  
18          and impartial to both sides? Do you  
19          remember that?

20          JUROR MONROE:

21          Yes.

22          THE COURT:

23          The question is did anything occur in  
24          this trial on Thursday, May 8, which was  
25          last Thursday, during the cross-  
26          examination of Dr. David Townsend that has  
27          affected your ability to be a fair and  
28          impartial juror in this case?

29          JUROR MONROE:

30          No.

31          THE COURT:

32          Thank you. If you would go back to

              20517

1           the jury lounge, we will call you when we  
2          are ready to start.

3          JUROR MONROE:

4          Okay.

5          THE COURT:

6          Thank you.

7          THE CLERK:

8          Ms. Silverman.

9          THE COURT:

10          Good morning, Ms. Silverman.

11          JUROR SILVERMAN:

12          Good morning.

13          THE COURT:

14          I'm going to ask you a question which  
15          I would like you to answer with a yes or a  
16          no after I tell you this.

17          I'm sure you will remember that when  
18          we were picking people for jury duty in  
19          this case, it was our goal to pick people  
20          who could be fair and impartial to both  
21          sides in the case. Do you remember that?

22          JUROR SILVERMAN:

23          Right.

24          THE COURT:

25          Here is the question: Did anything  
26          occur in this trial on Thursday, May 8th,  
27          which was last Thursday, during the cross-  
28          examination of Dr. David Townsend that has  
29          affected your ability to be a fair and  
30          impartial juror in this case?

31          JUROR SILVERMAN:

32          No.

              20518

1          THE COURT:

2          Thank you. Go back to the jury  
3          lounge and we will call you when we are  
4          ready to start.

5          JUROR SILVERMAN:

6 Thank you.  
7 THE CLERK:  
8 Ms. Wilson.  
9 THE COURT:  
10 Good morning, Ms. Wilson.  
11 JUROR WILSON:  
12 Good morning.  
13 THE COURT:  
14 I'm going to ask you a question after  
15 I tell you this, and I would like you to  
16 answer the question with a yes or a no,  
17 please.

18 JUROR WILSON:  
19 Okay.  
20 THE COURT:  
21 You will remember I'm sure that when  
22 we were picking people to be the jurors in  
23 the case, we were looking for people who  
24 could be fair and impartial to both sides  
25 in the case. Do you remember that?

26 JUROR WILSON:  
27 Yes.  
28 THE COURT:  
29 Here is the question: Did anything  
30 occur in this trial on Thursday, May 8,  
31 which was last Thursday, during the cross-  
32 examination of Dr. David Townsend that has  
20519  
1 affected your ability to be a fair and  
2 impartial juror in this case?  
3 JUROR WILSON:  
4 No.  
5 THE COURT:  
6 Thank you. Go back to the jury  
7 meeting room and we will call you when we  
8 are ready to start.  
9 THE CLERK:  
10 Mr. Reynolds.  
11 THE COURT:  
12 Good morning, Mr. Reynolds.  
13 JUROR REYNOLDS:  
14 Good morning. How are you doing?  
15 THE COURT:  
16 Fine, how are you doing?  
17 JUROR REYNOLDS:  
18 I'm making it.  
19 THE COURT:  
20 Good.  
21 I'm going to ask you a question in  
22 just a second, but before I do that I am  
23 going to tell you this, and I want you to  
24 answer the question with a yes or no when  
25 I ask it.  
26 JUROR REYNOLDS:  
27 Okay.  
28 THE COURT:  
29 You remember when we were picking  
30 people to be jurors in the case, what we  
31 were looking for were people who could be  
32 fair and impartial to both sides in the  
20520  
1 case? Do you remember that?  
2 JUROR REYNOLDS:

3 Yeah.

4 THE COURT:

5 Here is the question: Did anything  
6 occur during this trial on Thursday, May  
7 8, which was last Thursday, during the  
8 cross-examination of Dr. David Townsend  
9 that has affected your ability to be a  
10 fair and impartial juror in this case?

11 JUROR REYNOLDS:

12 No.

13 THE COURT:

14 Thank you. If you would go back to  
15 the jury lounge, we will call you when we  
16 are ready to start.

17 JUROR REYNOLDS:

18 Okay.

19 THE CLERK:

20 Ms. Thomas.

21 THE COURT:

22 Good morning, Ms. Thomas.

23 JUROR D. THOMAS:

24 Good morning.

25 THE COURT:

26 I'm going to ask you a question in  
27 just a minute or two, but I want to tell  
28 you something first, and I would like you  
29 to answer the question with a yes or no  
30 when I ask it.

31 You remember, I'm sure, that when we  
32 were picking people to serve on this jury,

20521

1 we were looking for people who could be  
2 fair and impartial to both sides in the  
3 case. Do you remember that?

4 JUROR D. THOMAS:

5 Yes.

6 THE COURT:

7 Here is the question: Did anything  
8 occur during this trial on Thursday, May  
9 8, that was last Thursday, during the  
10 cross-examination of Dr. David Townsend  
11 that has affected your ability to be a  
12 fair and impartial juror in this case?

13 JUROR D. THOMAS:

14 No.

15 THE COURT:

16 Thank you. Go back to the jury  
17 meeting room. We will call you when we  
18 are ready to start.

19 THE CLERK:

20 Mr. Belsom.

21 THE COURT:

22 Good morning.

23 JUROR BELSOM:

24 Yes, sir.

25 THE COURT:

26 I'm going to ask you a question in  
27 just a minute, but I want to tell you  
28 something first, and I would like you to  
29 answer the question with a yes or a no.

30 JUROR BELSOM:

31 Yes, sir.

32 THE COURT:

1 You will remember, I'm sure, when we  
2 were picking people to be on this jury, we  
3 were looking for people who could be fair  
4 and impartial to both sides in the case.

5 Do you remember that?

6 JUROR BELSOM:

7 Yes, sir.

8 THE COURT:

9 The question is did anything occur in  
10 this trial on Thursday, May 8, which was  
11 last Thursday, during the cross-  
12 examination of Dr. David Townsend that has  
13 affected your ability to be a fair and  
14 impartial juror in this case?

15 JUROR BELSOM:

16 No, sir.

17 THE COURT:

18 Thank you. If you would go back to  
19 the jury meeting room, we will call you  
20 when we are ready to start.

21 JUROR BELSOM:

22 Thank you.

23 THE CLERK:

24 Ms. Freemon.

25 THE COURT:

26 Come on up here, Ms. Freemon. Good  
27 morning.

28 JUROR FREEMON:

29 Good morning.

30 THE COURT:

31 I am going to ask you a question in  
32 just a minute, which I would like you to

1 answer with a yes or no.

2 Before I ask you that question, I  
3 want to remind you of something. You will  
4 recall, I'm sure, when we were picking  
5 people to be on this jury, we were looking  
6 for people who could be fair and impartial  
7 to both sides in the case. Do you  
8 remember that?

9 JUROR FREEMON:

10 Yes.

11 THE COURT:

12 The question I want to ask you is  
13 this. Did anything occur in this trial on  
14 Thursday, May 8, which was last Thursday,  
15 during the cross-examination of Dr. David  
16 Townsend that has affected your ability to  
17 be a fair and impartial juror in this  
18 case?

19 JUROR FREEMON:

20 No, it hasn't.

21 THE COURT:

22 Thank you. Go back to the jury  
23 meeting room. We will call you when we  
24 are ready to start.

25 THE CLERK:

26 Ms. Williams.

27 THE COURT:

28 Hi, Ms. Williams. Come on up here,  
29 please.

30 Good morning.  
31 JUROR E. WILLIAMS:  
32 Good morning.

20524

1 THE COURT:

2 I am going to ask you a question I  
3 would like you to answer with a yes or no,  
4 but before I do that, I want to remind you  
5 of the following.

6 I'm sure you will remember when we  
7 were picking people to be jurors in the  
8 case, we were looking for people who could  
9 be fair and impartial to both sides in the  
10 case. Do you remember that?

11 JUROR E. WILLIAMS:

12 Yes, sir.

13 THE COURT:

14 Here is the question. Did anything  
15 occur in this trial on Thursday, May 8,  
16 which was last Thursday, during the cross-  
17 examination of Dr. David Townsend that has  
18 affected your ability to be a fair and  
19 impartial juror in this case?

20 JUROR E. WILLIAMS:

21 No, sir.

22 THE COURT:

23 Thank you. If you will go back to  
24 the jury lounge, we will call you when we  
25 are ready to start.

26 JUROR E. WILLIAMS:

27 Okay.

28 THE CLERK:

29 Ms. St. Cyr.

30 THE COURT:

31 Good morning, Ms. St. Cyr.

32 JUROR ST. CYR:

20525

1 Good morning, Judge.

2 THE COURT:

3 Have a seat, please.

4 I am going to ask you a question in  
5 just a minute which I would like you to  
6 answer with a yes or a no. But before I  
7 ask you a question, I want to remind you  
8 of this.

9 You will remember when we were  
10 picking people to be on this jury, we were  
11 looking for people who could be fair and  
12 impartial to both sides in the case. Do  
13 you remember that?

14 JUROR ST. CYR:

15 Yes, sir, I remember.

16 THE COURT:

17 Here is the question. Did anything  
18 occur in this trial on Thursday, May 8,  
19 which was last Thursday, during the cross-  
20 examination of Dr. David Townsend that has  
21 affected your ability to be a fair and  
22 impartial juror in this case?

23 JUROR ST. CYR:

24 No.

25 THE COURT:

26 Thank you. If you would go back to

27 the jury meeting room, we will call you  
28 when we are ready to start.

29 JUROR ST. CYR:

30 Okay.

31 THE CLERK:

32 Ms. Collins.

20526

1 THE COURT:

2 Good morning.

3 JUROR COLLINS:

4 Good morning.

5 THE COURT:

6 Have a seat.

7 I'm going to ask you a question in  
8 just a minute for which I would like you  
9 to answer with a yes or no. But before I  
10 ask you the question, I want to remind you  
11 of this.

12 You remember, I'm sure, that when we  
13 were picking people to be jurors in the  
14 case, we were looking for people who could  
15 be fair to both sides and impartial as  
16 jurors. Do you remember that?

17 JUROR COLLINS:

18 Yes.

19 THE COURT:

20 Here is the question: Did anything  
21 occur in this trial on Thursday, May 8th,  
22 which was last Thursday, during the cross-  
23 examination of Dr. David Townsend that has  
24 affected your ability to be a fair and  
25 impartial juror in this case?

26 JUROR COLLINS:

27 No.

28 THE COURT:

29 Thank you. If you would go back to  
30 the jury meeting room, we will call you  
31 when we are ready to start.

32 THE CLERK:

20527

1 Ms. Williams.

2 THE COURT:

3 Come on up here, Ms. Williams,  
4 please.

5 JUROR C. WILLIAMS:

6 Good morning.

7 THE COURT:

8 Good morning.

9 I'm going to ask you a question in a  
10 minute to which I would like you to answer  
11 with a yes or no.

12 But first I want to remind you that  
13 you will remember when we were choosing  
14 people to be jurors in the case, we wanted  
15 people who could be fair and impartial to  
16 both sides. Do you remember that?

17 JUROR C. WILLIAMS:

18 Yes.

19 THE COURT:

20 The question is did anything occur in  
21 this trial on Thursday, May 8, which was  
22 last Thursday, during the cross-  
23 examination of Dr. David Townsend that has

24 affected your ability to be a fair and  
25 impartial juror in this case?

26 JUROR C. WILLIAMS:

27 No.

28 THE COURT:

29 Thank you. If you would go back to  
30 the jury meeting room, we will call you  
31 when we are ready to start.

32 THE CLERK:

20528

1 Mr. Petri.

2 THE COURT:

3 Come up here, Mr. Petri. Good  
4 morning.

5 JUROR PETRI:

6 Good morning, Your Honor.

7 THE COURT:

8 Have a seat.

9 I'm going to ask you a question which  
10 I would like you to answer with a yes or a  
11 no.

12 But before I do that, I want to  
13 remind you that you remember when we were  
14 picking people to be on this jury, we were  
15 looking for people who could be fair and  
16 impartial to both sides in the case. Do  
17 you remember that?

18 JUROR PETRI:

19 Yes, sir.

20 THE COURT:

21 Here is the question. Did anything  
22 occur during this trial on Thursday, May  
23 8th, which was last Thursday, during the  
24 cross-examination of Dr. David Townsend,  
25 that has affected your ability to be a  
26 fair and impartial juror in this case?

27 JUROR PETRI:

28 No, sir.

29 THE COURT:

30 Thank you. If you would go back to  
31 the jury meeting room, we will call you  
32 when we are ready to start.

20529

1 JUROR PETRI:

2 Thank you, sir.

3 THE CLERK:

4 Okay, Mr. Rose.

5 THE COURT:

6 Good morning.

7 JUROR ROSE:

8 Good morning. How are you doing?

9 THE COURT:

10 Fine.

11 JUROR ROSE:

12 Okay.

13 THE COURT:

14 I'm going to ask you a question in a  
15 minute to which I would like you to answer  
16 with a yes or a no.

17 Before I ask you the question, I want  
18 to remind you of this. You remember when  
19 we were picking people to be jurors in the  
20 case, we were looking for people who could

21 be fair and impartial to both sides in the  
22 case. Do you remember that?

23 JUROR ROSE:

24 Right.

25 THE COURT:

26 Here is the question. Did anything  
27 occur in this trial on Thursday, May 8th,  
28 which was last Thursday, during the cross-  
29 examination of Dr. David Townsend that has  
30 affected your ability to be a fair and  
31 impartial juror in this case?

32 JUROR ROSE:

20530

1 No.

2 THE COURT:

3 Thank you. If you would go back to  
4 the jury meeting room, we will call you  
5 when we are ready to start.

6 JUROR ROSE:

7 Okay.

8 THE COURT:

9 Thank you.

10 JUROR ROSE:

11 You are welcome.

12 THE COURT:

13 The record should reflect that I have  
14 questioned the twelve jurors and the seven  
15 alternate jurors, and that each of them  
16 responded negatively to the question I  
17 posed to them.

18 As a result of this questioning by  
19 the Court, anything for the record by  
20 movers?

21 MR. WITTMANN:

22 No, Your Honor.

23 THE COURT:

24 Respondents, anything for the  
25 record?

26 MR. MURRAY:

27 No, Your Honor.

28 THE COURT:

29 We will recess for five minutes, and  
30 I will announce my decision on this motion  
31 for mistrial.

32 MR. LONG:

20531

1 Your Honor, may we allow others back  
2 in the courtroom now?

3 THE COURT:

4 Yes, I see no reason not to.

5 MR. LONG:

6 Okay. Thank you.

7 (A recess is taken at 10:47 a.m.)

8 --- --

9 (In open court without a jury present  
10 at 10:55 a.m.:)

11 THE COURT:

12 As the record of my interrogation of  
13 the jurors will reflect, nothing was  
14 suggested during that questioning session  
15 by any of the jurors that would form the  
16 basis for my finding that misconduct has  
17 occurred that has deprived or will deprive

18 the defendants in this case of the benefit  
19 of a fair and impartial jury panel.

20 I find that whatever misconduct has  
21 occurred as a result of the cross-  
22 examination of Dr. David Townsend can  
23 certainly be cured by repeating my  
24 admonitions to the jury to the effect that  
25 they are to decide this case based on the  
26 evidence that they hear from the witness  
27 stand and the law that I give them at the  
28 close of the trial, and to remind them  
29 that what the lawyers say is not evidence  
30 in the case.

31 For those reasons, I find that there  
32 has not been proof brought to this Court's

20532

1 attention in this hearing to suggest that  
2 this jury cannot reach a fair and  
3 impartial verdict in the case because of  
4 the alleged irregularity by counsel during  
5 the cross-examination of Dr. David  
6 Townsend.

7 For those reasons, the defendants'  
8 motion for a mistrial is hereby denied.

9 It's my understanding that the  
10 witness, the live witness is due today at  
11 1:30. Is that correct?

12 MR. WITTMANN:

13 That's correct, Your Honor.

14 THE COURT:

15 And that prior to that we will have  
16 deposition testimony.

17 MR. WITTMANN:

18 Yes.

19 THE COURT:

20 And who will be called by depo?

21 MR. GAY:

22 Your Honor, Dr. Robin Kinser, which  
23 is a read-in deposition, and Ms. Cheryl  
24 Teamer from my office will do the  
25 reading.

26 And then a witness by the name of  
27 Fisher, which is a 12-minute video.

28 That may bring us to a conclusion,  
29 depending upon when we start, a little bit  
30 before noon.

31 We have a 45-minute deposition that  
32 we were planning to play that would not

20533

1 seem to fit in to --

2 THE COURT:

3 Give me the names of the deponents  
4 again?

5 MR. GAY:

6 Robin Kinser, K-i-n-s-e-r, Your  
7 Honor, and Fisher.

8 MR. WILLIAMS:

9 Phil Fisher, Your Honor, who is a  
10 former employee of B&W.

11 THE COURT:

12 Well, I'm looking at Mr. Copley's  
13 letter of May 9 which says: Time  
14 permitting, defendants expect to call the

15 following witnesses during the week of May  
16 12, and Fisher is not on the list.  
17

MR. WILLIAMS:

That letter was supplemented, Your Honor, and I believe plaintiffs have a copy of that supplemented --

MR. RUSS HERMAN:

Your Honor, we have no objection.

THE COURT:

I don't have that. Where is the supplement?

MS. BERTAUT:

Judge, we delivered that supplement, Your Honor, to you on Friday. My apologies to the Court if you don't have it.

MR. RUSS HERMAN:

I haven't gotten a supplement, Your  
20534

Honor, but I do know that Mr. Gertler -- whatever problems there were with Fisher were resolved.

I would like to have the supplement, but plaintiffs aren't going to make any objection.

THE COURT:

Mr. Gianna will meet with counsel in regard to the objections to the demonstratives planned to be used with Dr. Blackie's testimony.

MR. RUSS HERMAN:

I want to correct the record. I was out of town, but Regina says we did receive a supplemental letter regarding Mr. Fisher on Friday.

THE COURT:

If I have received it, I have not seen it.

MR. SCHNEIDER:

Your Honor, I don't know whether Your Honor has a copy of the expert report package, but I thought you might want to have that. There is a set of those.

MR. RUSS HERMAN:

The only thing we ask, Your Honor, so there will be no interruption, we understand that instead of the video of Dr. Kinser, there is going to be an actual reader, and that the reader be identified with whatever law firm calls him so that there is no misunderstanding by the jury

20535

that this isn't a witness.

THE COURT:

Has the answerer been agreed upon?

MR. RUSS HERMAN:

Mr. Gay says it's somebody from his law firm.

MR. GAY:

No, problem. I will identify her.

MR. RUSS HERMAN:

We are not going to object. If he has somebody from his law firm that wants

12 to read, that's fine. As long as they are  
13 clearly identified as a member of the  
14 firm.

15 THE COURT:

16 All right.

17 (In open court with a jury present at  
18 11:00 a.m.:)

19 THE COURT:

20 Please have a seat.

21 Before we begin this morning, ladies  
22 and gentlemen of the jury, I want to  
23 remind all of you again of the  
24 instructions I gave you at the beginning  
25 of the trial.

26 You are to decide this case based  
27 upon the evidence you hear from this  
28 witness chair and the exhibits that are  
29 introduced into evidence and the law that  
30 I give you at the close of trial, and  
31 nothing else.

32 I told you then and I will tell you  
20536

1 again, what the lawyers say is not  
2 evidence, and if I sustain an objection to  
3 a question, you are to disregard that  
4 question and not try to decide or  
5 speculate as to what the witness might  
6 have said if allowed to answer that  
7 question.

8 We will now present the testimony  
9 of --

10 MR. GAY:

11 Robin Dale Kinser, Your Honor.

12 THE COURT:

13 -- who was deposed in this case.

14 And as I have told you in the past,  
15 this is a method that the law allows for  
16 the presentation of testimony of a witness  
17 without the witness being physically  
18 present.

19 And you are to take the testimony  
20 that you are about to hear from Robin Dale  
21 Kinser as though Dr. Kinser were present  
22 and sitting in the witness chair.

23 And Mr. Gay, you will introduce the  
24 answerer, please?

25 MR. GAY:

26 Yes, Your Honor.

27 Good morning, members of the jury.

28 This is one of my law partners,  
29 Ms. Cheryl Teamer, who will be reading the  
30 answers of Dr. Kinser from a deposition  
31 that was taken in a case entitled Howard  
32 A. Engle versus R. J. Reynolds Tobacco

20537

1 Company, et al., on July 1st, 1998; and  
2 also from a case in which Dr. Kinser's  
3 testimony was taken by deposition on  
4 October 10, 1997, entitled Arch versus The  
5 American Tobacco Company.

6 And that I believe are the two  
7 depositions from which the designations  
8 will be read.

9 MR. RUSS HERMAN:

10 If it please the Court, Steve Herman  
11 handle any objections, if necessary, for  
12 the plaintiffs.

13 MR. GAY:

14 And Your Honor, just so it's clear,  
15 what I will be reading will be questions  
16 to Dr. Kinser designated by both the  
17 defendants and the plaintiffs.

18 I believe we start at page four.  
19 -- -- --  
20

ROBIN DALE KINSER

21 being previously duly sworn, testifies and says as  
22 follows by deposition:

-- -- --

EXAMINATION

25 Q. Can you state your name for the  
26 record, please?

27 A. My name is Robin Dale Kinser.

28 Q. Do you know why you have been  
29 listed as a fact witness?

30 A. I was told that the company  
31 listed me as a fact witness as a possible  
32 response to another witness.

20538

1 Q. A response to what witness?

2 A. William Raymond Morgan.

3 Q. Do you know William Raymond  
4 Morgan?

5 A. Yes, I do.

6 Q. And how do you know him?

7 A. I worked with him.

8 Q. What period of time did you  
9 work with him?

10 A. We were both employees of R&D.  
11 He was already employed when I joined the  
12 company. We worked in the same group for  
13 a few years, starting in the early '80s,  
14 and I was his supervisor or his  
15 supervisor's supervisor until he left the  
16 company.

17 Q. What period of time would you  
18 have been his supervisor or his  
19 supervisor's supervisor?

20 A. From around 1985 through 1992.

21 Q. In other words, do you know  
22 whether or not, if you took the alkaloids  
23 out, the tobacco-specific nitrosamines  
24 would still exist to the same extent in  
25 tobacco smoke?

26 A. I don't know for sure.

27 Q. Has there been any research  
28 about that, that you are aware of?

29 A. Yes, there has.

30 Q. And what research about that  
31 are you aware of?

32 A. I'm aware of research where

20539

1 tobacco that is depleted in amines or in  
2 the alkaloids is smoked and there is a  
3 reduced level in the smoke relative to a  
4 tobacco that's smoked that has a normal  
5 level of alkaloids.

6 Q. Who did that research?

7 A. The project I ref -- smoke  
8 condensate studies project did research on  
9 that area.

10 Q. What specific individuals did  
11 that research?

12 A. Steve Haut, Ray Morgan, Ernest  
13 Lambert. I think a technician Ralph  
14 Kaiser worked on that research. I don't  
15 recall if I actually was involved in the  
16 laboratory work on that research or not.

17 Q. Were you the supervisor of the  
18 individuals who did that research at the  
19 time they did the research?

20 A. Yes, I was.

21 Q. Who was your supervisor at that  
22 time?

23 A. For part of that time, Ted  
24 Sanders was my supervisor, and I believe  
25 for part of that time, Kathy Ellis was my  
26 supervisor.

27 Q. Did you inform your supervisor,  
28 whoever it was at that time, of the  
29 results of the research?

30 A. Yes, I did.

31 Q. Were the results of the  
32 research put in written form?

20540

1 A. There were reports and  
2 memoranda that described the research,  
3 yes.

4 Q. Did anyone at any time,  
5 including your supervisor, suggest to you  
6 that the research be published in the  
7 public domain?

8 A. I don't recall any such  
9 suggestion.

10 Q. In your opinion, would it have  
11 added anything to the knowledge base in  
12 the public domain if the information had  
13 been published at the time it was, at the  
14 time the research was completed?

15 A. Yes.

16 Q. And what is the basis for that  
17 opinion?

18 A. Our results shed some insight  
19 regarding formation mechanisms.

20 Q. What was the research that --  
21 what was the light it shed regarding  
22 formation mechanisms?

23 A. The fact that there was a  
24 reduction in the cigarette smoke when one  
25 smoked a tobacco that had been depleted to  
26 some degree in alkaloids.

27 Q. Do you recall whether anyone  
28 who worked on the research made the  
29 suggestion that it be published?

30 A. I don't recall any such  
31 suggestion.

32 Q. If someone said that that  
20541

1 suggestion was made, would you be of the  
2 opinion that they were lying about it?

3           A. No, I would not be of the  
4           opinion that they were lying about that.  
5

6           Q. Did you ever work with someone  
7           named Jan Jones?  
8

9           A. Jan Jones and I were both  
10          employed in R&D. We were not ever  
11          assigned to the same project that I can  
12          recall.  
13

14          Q. And of course when you say R&D,  
15          you mean research and development; right?  
16

17          A. Yes, yes, I do.  
18

19          Q. So you never supervised Jan  
20          Jones?  
21

22          A. No, I did not.  
23

24          Q. Were the researchers instructed  
25          not to use commercial cigarettes?  
26

27          A. The experimental designs that  
28          we put together required an ability to  
29          control the components of the cigarette in  
30          such a way that commercial cigarettes were  
31          not desirable.  
32

33          Q. Do you know whether any  
34          researcher ever did, even one time, use a  
35          commercial cigarette or commercial  
36          cigarettes for any of this research?  
37

38          A. I don't think of it as a  
39          research study, but I remember being  
40          provided commercial cigarettes and asked  
41          to have them analyzed for their  
42          nitrosamine content during the time that I  
43

20542

1          was section leader.  
2

3          Q. What specific commercial  
4          cigarette or cigarettes did he ask you to  
5

6          A. I don't remember the full set  
7          now, but they included the cigarettes that  
8          had the reduced alkaloid tobacco from our  
9          ART project, the commercial terminology or  
10         brand, excuse me, is the right word, was  
11         Nic and/or De-Nic. There probably were  
12         some controls in that set as well, but I  
13         don't remember specifically what all the  
14         cigarettes were.  
15

16          Q. The ones you are certain of are  
17          those that were the denicotinized  
18          cigarettes; is that correct?  
19

20          A. Yes. Again, I don't look at  
21          this as a research project. We were just  
22          asked to analyze these cigarettes. They  
23          included denicotinized cigarettes. I  
24          think that the term is fine.  
25

26          And there may have been some normal  
27          controls. I don't recall at this point  
28          what we used as a control and what the  
29          full set of cigarettes I was presented  
30          were.  
31

32          Q. Do you know whether the  
33          Virginia Slims cigarette was ever, at any  
34          time, tested?  
35

36          A. I don't know of Virginia Slims  
37          being tested for nitrosamine content.  
38

39          MR. GAY:

1 I think we missed a question, so let  
2 me go back. Going back to line 13.

3 Q. Well, at any time. I'm talking  
4 about the time frame between 1985 and  
5 1993, during the time that you worked on  
6 the project that was primarily related to  
7 tobacco-specific nitrosamines in Richmond  
8 Virginia?

9 A. I don't know of Virginia Slims  
10 being tested for nitrosamine content.

11 Q. Do you know that it wasn't?

12 A. I don't have any recollection  
13 of doing an evaluation of branded  
14 cigarettes, branded commercial cigarettes,  
15 other than the one that I just told you  
16 about.

17 Q. Did William Ray Morgan ever  
18 inform you that he had run a test on a  
19 commercial cigarette and found that the  
20 nitrosamine level was larger than the  
21 nitrosamine level in the reference  
22 cigarette?

23 A. No.

24 Q. Did William Ray Morgan ever run  
25 any kind of test on a commercial  
26 cigarette?

27 A. I have no knowledge that he  
28 did.

29 Q. But you don't know one way or  
30 the other whether he did or not; is that  
31 correct?

32 A. I never had any reports from  
20544

1 him during the time I was his supervisor  
2 about his running studies of branded  
3 cigarettes.

4 Q. Was William Ray Morgan ever  
5 told to destroy any research that he had  
6 collected?

7 A. I never told him to destroy any  
8 research data that he had collected.

9 Q. Do you know whether anyone ever  
10 told him to destroy any research data he  
11 had collected?

12 A. I have no knowledge of anyone  
13 ever telling him to destroy any research  
14 data.

15 Q. Did you ever have any  
16 discussions with Kathy Ellis regarding any  
17 research that was done by William Ray  
18 Morgan?

19 A. Yes. I had many discussions  
20 with Kathy about research that was done by  
21 William Ray Morgan.

22 Q. Did you consider him to be a  
23 good scientist?

24 A. Yes, I did.

25 Q. Did you ever evaluate his work?

26 A. Yes, I did.

27 Q. Did he receive evaluations from  
28 you indicating that he was a good  
29 scientist?

30           A. During those time frames when I  
31 thought he was a good scientist, that's  
32 what I put in his evaluation.

20545

1           Q. Was there any time frame where  
2 you supervised him when you thought he was  
3 not a good scientist?

4           A. There was a time frame when  
5 there were some attendance issues and some  
6 difficulties that I think had an impact on  
7 his work, and those would have also been  
8 reported in his performance appraisal.

9           Q. Now, you mentioned some period  
10 of time when there were attendance  
11 issues. What specifically are you  
12 referring to when you say attendance  
13 issues involving William Ray Morgan?

14          A. What I would call an unplanned  
15 vacation time. Absences where we might  
16 receive a call one morning that he  
17 wouldn't be in that day.

18          Q. Did this happen all in one  
19 general period of time or did it happen  
20 over a period of years?

21          A. I remember that it worsened at  
22 one point in time. I can't tell you  
23 precisely what year that was.

24          Q. When you say worsened, what do  
25 you mean?

26          A. More frequent, unplanned  
27 absences.

28          Q. So when he was at work, as far  
29 as you know, the quality of his work was  
30 good; is that correct?

31          A. At this point in time, I think  
32 the best answer I can give is that the

20546

1           quality of his work met the requirements  
2 for his job.

3          Q. And during that period of time,  
4 your recollection is he shared some  
5 concerns he had with you about the prior  
6 position he held prior to 1983 with  
7 Philip Morris?

8          A. I have the recollection that he  
9 had been unhappy. I also have a  
10 recollection of getting that impression  
11 from some of my management when he was  
12 moved into our group, that this was viewed  
13 as a better fit for him possibly.

14          Q. Which management gave you that  
15 impression?

16          A. My manager at the time was Jim  
17 Charles.

18          Q. Do you have any personal  
19 knowledge that Ray Morgan ever received an  
20 unsatisfactory evaluation, work  
21 evaluation, while he worked at  
22 Philip Morris?

23          A. No. I have no recollection of  
24 that.

25          I want to mention again that between  
26 1988 and the end of 1992, as a section

27 leader, there were other project leaders  
28 who reported to me. So I was not directly  
29 supervising Ray Morgan's work at that  
30 time. I was the supervisor of his  
31 supervisor.

32 Q. Who was directly supervising  
20547

1 his work?

2 A. I'm pretty sure that was Al  
3 Warfield.

4 Q. And during any of these  
5 studies, was the smoke in the chamber aged  
6 and measured, the nitrosamine level  
7 measured as the smoke aged?

8 A. The chamber was used to study  
9 aged sidestream smoke.

10 Q. And what, if anything, did the  
11 research show regarding the level of NNK  
12 nitrosamine as the smoke aged in the  
13 chamber?

14 A. I don't recall that we did  
15 studies in this chamber related to the  
16 effect of aging on NNK.

17 Q. When you say you don't recall,  
18 does that mean you might have, you just  
19 don't remember right now?

20 A. It means I don't remember that  
21 we did studies on the effect of aging on  
22 NNK in this chamber.

23 Q. Well, did you find or did  
24 anyone who did this research at  
25 Philip Morris find that as the smoke aged,  
26 the level of the nitrosamine level  
27 increased?

28 A. You are asking me about  
29 experiments conducted between 1988 and  
30 1992; is that correct?

31 Q. Yes.

32 A. I don't remember that kind of  
20548

1 study -- I don't know that that kind of  
2 study was conducted in that time frame.

3 Q. Do you know of any research  
4 done anywhere along that topic?

5 A. Yes.

6 Q. And what research are you aware  
7 of and where was it done?

8 A. There were some studies  
9 conducted at the Philip Morris R&D in  
10 Europe.

11 Q. And when were the studies on  
12 aged chamber smoke related to the  
13 nitrosamine level done in Neuchatel in  
14 Switzerland, as far as you know?

15 A. Early to mid '80s.

16 Q. And you don't know whether or  
17 not that research was ever done in  
18 Richmond; is that correct?

19 A. I don't have any recollection  
20 of being involved in any planning or  
21 hearing any results from research  
22 regarding changes in NNK in aged  
23 sidestream smoke.

24 Q. Was Roger Comes at any time in  
25 charge of the chamber?

26 A. Yes, he was.

27 Q. Was he in charge of the chamber  
28 in 1988-89?

29 A. To the best of my recollection,  
30 yes, he was.

31 Q. Do you recall whether Roger  
32 Comes ever told you, identified a Virginia  
20549

1 Slims cigarette as a cigarette that had  
2 been tested in the chamber?

3 A. I don't have a recollection of  
4 having a discussion with Roger about his  
5 testing Virginia Slims.

6 Q. You are not absolutely ruling  
7 out the possibility that Roger Comes  
8 mentioned a Virginia Slims being tested in  
9 the chamber; is that correct?

10 A. I am not ruling out the  
11 possibility that at some time Roger Comes  
12 told me that they were looking at Virginia  
13 Slims cigarettes in the chamber.

14 Q. Have you had any conversations  
15 with any former or current employees of  
16 Philip Morris, other than attorneys,  
17 concerning the statements made by William  
18 Ray Morgan regarding testing the Virginia  
19 Slims cigarette?

20 A. Yes, I have.

21 Q. Who else have you discussed  
22 this with?

23 A. With Kathy Ellis.

24 Q. Yes. When was the most recent  
25 time you have talked with Kathy Ellis  
about this?

26 A. Eighteen months ago or more.

27 Oh, wait, wait. Excuse me. Let me  
28 think a minute. I'm sorry.

29 It would have been March, April of  
30 1997. So I guess --

31 Q. What was the reason you talked  
32 20550

1 to her in March or April of 1997 about the  
2 statements that William Ray Morgan made?

3 A. Kathy was the person who let me  
4 know about the statements he made in his  
5 deposition.

6 Q. And it's your understanding  
7 that he said that you had -- he had told  
8 you about the tests he had done and you  
9 ascertained from Robin -- from Roger  
10 Comes, that it was a Virginia Slims  
11 cigarette; correct?

12 A. That's what I understand he  
13 alleged in his deposition.

14 Q. And that you then checked with  
15 Kathy Ellis, and Kathy Ellis told you to  
16 tell Ray Morgan to destroy the data that  
17 he had collected; correct?

18 A. That's what I recall that he  
19 said.

20 Q. So Kathy Ellis, as soon as she

21           became aware that Ray Morgan had made this  
22           statement, contacted you to let you know  
23           what Ray Morgan had said; is that correct?  
24

25           A.     I don't have any idea if it  
26           was -- if she tried to contact me as soon  
27           as she knew.

28           Q.     But whenever, she contacted you  
29           to let you know what Ray Morgan had said;  
30           correct?

31           A.     That's correct.

32           Q.     What did you say after Kathy  
33           Ellis conveyed this information to you?  
34           20551

1           A.     I don't remember my exact  
2           words, but I conveyed that I didn't have  
3           any idea what he was talking about.

4           Q.     You are aware that there was a  
5           study done in 1997 at the request of  
6           Dr. Kathy Ellis concerning a measurement  
7           of the NNK nitrosamine level of the aged  
8           smoke of a Virginia Slims cigarette;  
9           correct?

10          A.     Yes.

11          Q.     What was your involvement in  
12           participating in planning the experiment?

13          A.     I helped select the cigarettes  
14           to be utilized in the study, and I  
15           coordinated getting set up for the study  
16           and the necessary rearrangement of other  
17           experimental plans with the scientists at  
18           PME R&D who conducted the experiment.

19          Q.     What was the purpose of the  
20           experiment?

21          A.     As I would state it, the  
22           purpose was to determine if there was such  
23           a level as reported by Ray Morgan present  
24           in aged sidestream from those  
25           cigarettes -- reported by Ray in his  
26           deposition.

27          I don't know the results from those  
28           experiments.

29          Q.     You've never seen the results?

30          A.     I have not seen the results,  
31           the final results.

32          Q.     As a general matter, you were  
33           20552

1           trying to identify and measure TSNA levels  
2           in tobacco and cigarette smoke?

3           A.     That was an activity.

4           Q.     What other activities were you  
5           doing related to nitrosamines?

6           A.     We were trying to -- excuse  
7           me. We were doing research on the origins  
8           of the nitrosamines in cigarette smoke,  
9           and we were trying to determine methods by  
10           which the nitrosamine content of  
11           mainstream cigarette smoke could be  
12           reduced.

13          Q.     Did you have an understanding  
14           as to why Philip Morris was looking into  
15           nitrosamines?

16          A.     I knew that there were reports  
17           in the referred literature that indicated

18           that there was a carcinogenicity or  
19           tumorigenicity associated with  
20           nitrosamines.

21           Q.     Have you ever studied nicotine  
22           as a chemical in any way?

23           A.     Yes, I have.

24           Q.     And how have you studied  
25           nicotine?

26           A.     I have conducted experiments to  
27           evaluate the question of whether nicotine  
28           is a precursor to mainstream NNK.

29           Q.     NNK, all capped, which is an  
30           abbreviation for a very, very long  
31           chemical nitrosamine name.

32           Let's go back to the projects you  
              20553

1           described during the period '88 to '93.

2           Was Dr. Gullotta reporting to you?

3           A.     Yes, he was.

4           Excuse me. I don't know if he  
5           reported to me up through the end of '92.

6           Q.     Project 1904, the study of  
7           alterations to the tobacco plant, do you  
8           remember mentioning that in the study?

9           A.     Yes.

10          Q.     What were the activities of  
11          that study during that period?

12          A.     That research was focused at  
13          yielding a modified tobacco plant that  
14          produced less nicotine.

15          Q.     Was that genetically modified?

16          A.     Yes.

17          Q.     And the reason why you would  
18          want to produce less nicotine is because  
19          if you produce less nicotine, you are  
20          producing less alkaloid; is that correct?

21          A.     Nicotine is an alkaloid.

22          Q.     And you were attempting to  
23          produce less alkaloid?

24          A.     We were attempting to produce  
25          less nicotine.

26          Q.     And you were attempting to do  
27          that because nicotine is a precursor for  
28          TSNA formation?

29          A.     The focus of the 1904 work was  
30          on reducing nicotine -- to reduce  
31          nicotine. The question of nicotine as a  
32          precursor for nitrosamines has different

              20554

1           answers in the published referred  
2           literature.

3           Q.     Why were you trying to produce  
4           less nicotine in the 1904 project?

5           A.     There is a variety of compounds  
6           that do link in some way.

7           The work that was being done in 1904  
8           was focused on nicotine. If we were  
9           successful with nicotine, that may have  
10          suggested other endeavors we could follow  
11          that could be more pertinent to other  
12          classes of compounds.

13          There are also -- and this is my  
14          personal recollection of what was going

15       on. This was in the context of other  
16       endeavors by the company to have a  
17       cigarette with reduced nicotine.

18       Q. Was this in conjunction with  
19       the ART Project, cap A, cap R, cap T?

20       A. It was not in conjunction with  
21       it. It was another method. The ART  
22       Project was one way of approaching  
23       alkaloid and/or nicotine production. This  
24       was another way.

25       Q. Was this successful, the  
26       attempt to modify the tobacco plant to  
27       produce less nicotine --

28            MR. GAY:

29            Excuse me, I read that wrong.

30       Q. Was this successful, the  
31       attempt to modify the tobacco plant to  
32       produce less tobacco?

            20555

1       A. From my perspective, the  
2       experiments are still continuing. I can't  
3       answer that question now.

4       Q. Is 1904 still a billing code?

5       A. No, it is not.

6       Q. What is it now?

7       A. We've changed that system. I  
8       don't know how to answer that question.

9       Q. You don't have to. But the  
10      project is still going on, this study of  
11      altering the tobacco plant to produce less  
12      nicotine?

13       A. Yes.

14       Q. Have there been any  
15       preliminary --

16       A. Yes.

17       Q. -- results of that attempt to  
18       do that?

19       And what have the preliminary results  
20       showed?

21       A. We have seen some plants with  
22       reduced nicotine levels.

23       Q. And this is -- is it fair to  
24       call it genetic modification of the plant?

25       A. Yes, it is.

26       Q. Has any of the nicotine that  
27       has been produced from these modified  
28       tobacco plants ever been used in  
29       commercial cigarettes?

30       A. No.

31       Q. When were you told that  
32       Dr. DeNoble's lab was being closed?

            20556

1       A. My recollection is a meeting in  
2       A-1 Conference Room.

3       Q. Who attended that meeting?

4       A. The Biochemical Research  
5       Division was invited, as I recall. I  
6       don't know who attended.

7       Q. Who chaired the meeting?

8       A. Ted Sanders.

9       Q. Were you told why the lab was  
10      being closed?

11       A. I don't remember hearing a

12 reason.

13 Q. Have you ever found out why the  
14 lab was closed?

15 A. I don't remember that I've ever  
16 heard an answer from someone I would think  
17 knew the exact answer.

18 Q. You heard answers from people  
19 that may know the exact answer -- or may  
20 not know the exact answer?

21 A. I've heard speculation.

22 Q. What's the speculation that  
23 you've heard?

24 A. That the company did not want  
25 to be involved in the type of research  
26 Dr. DeNoble was conducting for --

27 Q. The research being the study of  
28 reinforcing properties of chemicals in  
29 rats?

30 A. I don't remember the exact  
31 subjects of Dr. DeNoble's studies.

32 Q. Dr. Kinser, does the types of  
20557

1 filler that's used in the rod affect the  
2 TSNA formation as far as your research was  
3 concerned?

4 A. Yes, it does.

5 Q. In other words, the type of  
6 tobacco that's in the rod in large measure  
7 affects the formations of nitrosamines;  
8 correct?

9 A. Yes.

10 Q. And therefore TSNA reductions  
11 could be accomplished merely by the  
12 selection of certain blends; is that  
13 correct?

14 A. Yes. You could put together  
15 blends and make -- there be differences in  
16 the TSNA deliveries, yes.

17 Q. And make one TSNA delivery be  
18 lower than another; correct?

19 A. Theoretically, yes.

20 Q. Has Philip Morris attempted to  
21 blend cigarettes with TSNA deliveries in  
22 mind?

23 A. I don't know the answer to  
24 that. I'm not involved in blend  
25 development decisions.

26 Q. Have you ever heard that  
27 Philip Morris does select blends with TSNA  
28 deliveries in mind?

29 A. I have never heard that.

30 Q. Have you ever heard that they  
31 don't select blends with TSNA deliveries  
32 in mind?

20558

1 A. I have never heard that.

2 Q. Dr. Kinser, are you aware of  
3 any research studies being shredded at  
4 Richmond R&D by anybody?

5 A. When we collect information and  
6 enter it into notebooks or prepare  
7 reports, we may go through a drafting  
8 stage where tables have first been

9 written. And when we reach our final  
10 report table, we may not keep all of the  
11 information that was used to work up to  
12 that.

13 And because we don't want our  
14 competitors going through our trash, we do  
15 not just wad things up and throw them in  
16 the garbage. We shred them.

17 Q. Are you aware of any  
18 supervisors instructing scientists at  
19 Philip Morris to destroy research results  
20 because they were perceived as being  
21 unfavorable?

22 A. No, I am not.

23 Q. Have you ever done that?

24 A. No, I have not.

25 Q. Have you ever been a party to  
26 someone else ordering someone to destroy  
27 research results?

28 A. No, I have not.

29 Q. Has anyone ever told you to  
30 instruct someone to destroy research  
31 results?

32 A. No one has.

20559

1 Q. Are you aware of Philip Morris  
2 trying to replicate a study that Dr. Ray  
3 Morgan allegedly conducted in the 1980s  
4 measuring aged sidestream smoke of a  
5 commercial cigarette?

6 A. Yes, I am.

7 Q. Are you aware that that study  
8 was done at FTR?

9 A. I call it PME, but, yes.

10 Q. PME? What was your involvement  
11 in that study? That's really what I'm  
12 getting to.

13 A. I coordinated the setup of that  
14 study with the people who have  
15 responsibilities for the experimental  
16 apparatus and measurements at PME R&D and  
17 help acquire the cigarettes that were  
18 going to be used in that study.

19 Q. And were you able to duplicate  
20 the experiment that Dr. Morgan has  
21 testified that he performed?

22 A. I don't understand your  
23 question when you ask if we were able to  
24 duplicate the experiment.

25 Q. Okay. Why did you -- why was  
26 this study conducted?

27 A. Dr. Ellis decided to have the  
28 study conducted.

29 Q. What's your understanding of  
30 why?

31 A. Insomuch as I cannot speak for  
32 her, it was in response to the allegations

20560

1 that Dr. Morgan made in his deposition.

2 Q. And do you know the results of  
3 the study that was conducted?

4 A. I only know some preliminary  
5 results.

6 Q. And what were the preliminary  
7 results that you know?

8 A. The preliminary results that I  
9 heard did not -- were not those reported  
10 by Dr. Morgan in his deposition.

11 Q. He reported very high levels of  
12 nitrosamine formations from aged  
13 sidestream smoke?

14 A. That's what I recall, yes.

15 Q. And those are not the  
16 preliminary results that you are aware of?

17 A. The preliminary results of  
18 which I am aware did not indicate any  
19 difference between the test cigarette and  
20 the control cigarette.

21 MR. GAY:

22 That concludes Dr. Kinser's  
23 testimony, Your Honor.

24 Thank you, Cheryl.

25 THE COURT:

26 The next deposition is that of whom?

27 MR. WILLIAMS:

28 Your Honor, the next deposition is of  
29 Phil Fisher, who was a B&W employee from  
30 1963 to 1991.

31 He was an agronomist, which is the  
32 science of the study of soil management,

20561

1 and his position primarily was that of a  
2 leaf blower at B&W during that period of  
3 time.

4 THE COURT:

5 What form will that deposition take?

6 MR. WILLIAMS:

7 I forgot the most important thing,  
8 excuse me. The most important thing:  
9 It's less than fifteen minutes.

10 THE COURT:

11 And what form will the deposition  
12 take?

13 MR. WILLIAMS:

14 It's a video, Your Honor.

15 -- -- --

16 PHIL FISHER

17 being previously duly sworn, testifies and says as  
18 follows by videotaped deposition:

19 -- -- --

20 EXAMINATION

21 Q. Mr. Fisher, let me ask first,  
22 where are you currently employed?

23 A. I'm retired and a farmer.

24 Q. Where are you retired from,  
25 sir?

26 A. Brown & Williamson Tobacco  
27 Corporation.

28 Q. When did you retire?

29 A. July the 1st, 1991.

30 Q. And how long did you work for  
31 Brown & Williamson before you retired,  
32 sir?

20562

1 A. Twenty-seven years.

2 Q. You remember your starting

3 date?  
4 A. 1963, it was either June or  
5 July.

6 Q. And you worked continuously for  
7 Brown & Williamson from 1963 to 1991?

8 A. Correct.

9 Q. Can you state what your job  
10 titles were while working for Brown &  
11 Williamson over the years? I'm assuming  
12 there weren't many changes, but you can  
13 begin and we can talk about it as you go  
14 along; okay, sir? Start in '63 and just  
15 move forward.

16 A. Okay. I started in 1963 as an  
17 agronomist.

18 And then I became section leader in  
19 the Research Department, which included  
20 agronomy and microbiology.

21 Then I became assistant leaf  
22 blender.

23 Then I became leaf blender.

24 Then I became leaf blender and in  
25 charge of green leaf processing.

26 Then I became -- I forgot the exact  
27 title, but basically it was all of the  
28 agriculture and leaf tobaccos.

29 Q. Was it still a blending type  
30 job?

31 A. Oh, yes, absolutely.

32 Q. And that was your last job that  
20563

1 you held?

2 A. That's right.

3 Q. So the jobs where your title  
4 included leaf blending began in what year,  
5 sir?

6 A. Approximately late '70s. I  
7 don't remember the exact year.

8 Q. Okay.

9 A. Mid '70s, I would say.

10 Q. All right. You mentioned that  
11 when you started you were an agronomist?

12 A. Correct.

13 Q. Explain exactly what that is?

14 A. Agronomists, for Brown &  
15 Williamson, we would go into various  
16 tobacco fields all over the country, look  
17 at the quality of the leaf; report back to  
18 the leaf buyers where the tobaccos were  
19 that had the most promise; did reports on  
20 them, on the different areas, both flue-  
21 cured and Burley, and compiled reports on  
22 them, on the quality of the leaf before  
23 the markets opened; and then visited the  
24 tobacco markets as the sales season  
25 started.

26 Q. All right. Now, how did that  
27 change when you became a leaf blender?  
28 What was your job, if you could describe  
29 it, as a leaf blender?

30 A. Leaf blender, my job primarily  
31 was to maintain existing blends.

32 Q. And when you talk about blends,

1 are you talking about for purposes of  
2 cigarettes?

3 A. Yes.

4 Q. Brown & Williamson cigarettes?

5 A. Brown & Williamson cigarettes.

6 Q. All right, sir.

7 A. But it also included pipe  
8 tobaccos and other products.

9 Q. Any Brown & Williamson Tobacco  
10 product?

11 A. That's correct.

12 Q. All right, sir. Did your job  
13 at any time include responsibility for the  
14 design of the filter of cigarettes?

15 A. No.

16 Q. Did your job, sir, at any time  
17 entail responsibility for the cigarette  
18 paper?

19 A. No.

20 Q. Did your job at any time, sir,  
21 entail responsibility for smoking  
22 behavior?

23 A. I don't understand what you  
24 mean by smoking behavior.

25 Q. With reference to how people  
26 smoke a cigarette and what happens when  
27 people smoke cigarettes?

28 A. Are you referring to research  
29 on how people smoke cigarettes?

30 Q. That would be one area.

31 A. No, I did not. No.

32 Q. Can you think of any area that

20565

1 may touch on that, sir, smoking behavior?

2 A. From a leaf blending  
3 standpoint, I had to teach people to smoke  
4 cigarettes.

5 Q. Okay. How did that work?

6 A. Well, in teaching leaf  
7 blending, you have several different  
8 components of a blend. You have to smoke  
9 individual components of the blend and  
10 recognize the physical and chemical  
11 characteristics, and by visual.

12 And then you smoke it, and you fix  
13 that in your mind. And over the years and  
14 years of experience, you become so that  
15 you can look at tobacco and tell how it  
16 smokes.

17 Q. So was this an expertise that  
18 you developed specifically over the years?

19 A. Oh, it was expertise that was  
20 taught to me, and then everyone develops  
21 it over years. You don't just go to  
22 school to be a leaf blender. It's years  
23 of experience.

24 Q. It's primarily based on  
25 experience?

26 A. Yes.

27 Q. Were there others who worked as  
28 leaf blenders at the same time you did for  
29 Brown & Williamson?

30                   A.     Yes.  
31                   Q.     Approximately how many other  
32     people let's say in the 1970s were working  
                      20566  
1     as leaf blenders? Is that a fair  
2     question?  
3                   A.     I'd say approximately four, and  
4     it's a guess.  
5                   Q.     Did that change in the 1980s?  
6                   A.     Yes, probably went up to five  
7     or six.  
8                   Q.     And how about the 1990s?  
9                   A.     I retired in '91, so --  
10                  Q.     That's true, 1991. So for that  
11     couple of years?  
12                  A.     I think we had about five when  
13     I left. Now, that's an estimate.  
14                  Q.     Were you the supervisor or --  
15                  A.     Yes.  
16                  Q.     Okay. So these other four or  
17     five people worked under you?  
18                  A.     Correct.  
19                  Q.     Was that true throughout the  
20     '70s, the '80s, and until you retired?  
21                  A.     The '80s it was true, but I  
22     worked under leaf blenders in the late  
23     '70s.  
24                  Q.     All right. Before you get to  
25     that, I thought I heard you mention when  
26     you were talking something about  
27     microorganisms?  
28                  A.     I said I was in charge of the  
29     microbiology department.  
30                  Q.     Did that have anything to do  
31     with the farming of tobacco plants?  
32                  A.     No.

20567

1     Q.     Did that have anything to do  
2     with microorganisms being used in any way  
3     with reference to tobacco?  
4                  A.     We have several patents which  
5     are readily available using  
6     microorganisms.  
7                  Q.     But were you, sir, directly  
8     involved in that process --  
9                  A.     Yes.  
10                 Q.     -- using microorganisms?  
11                 A.     Yes.  
12                 Q.     Yes?  
13                 A.     Yes.  
14                 Q.     When was that, estimate?  
15                 A.     Huh?  
16                 Q.     An estimate.  
17                 A.     In '67 to '91.  
18                 Q.     And what was that process  
19     intended to do, the use of the  
20     microorganisms?  
21                 A.     Well, the microbiology  
22     department's main concern was that this is  
23     a commodity that people put in their  
24     mouth, and we were concerned with plant  
25     hygiene, with supplier's hygiene, products  
26     being hygienically acceptable, and that

27 was the biggest job or biggest part of the  
28 microbiology function.

29 Q. Was there anything with  
30 reference to the use of microorganisms  
31 that would affect the nicotine in the  
32 plant?

20568

1 A. Not the nicotine in the plant,  
2 but the nicotine of the finished product.

3 The patents, as I recall, were on the  
4 nitrate reduction, reduction of nitrate in  
5 a wet solution, not on the leaf itself --

6 Q. I see.

7 A. -- but in some of the  
8 by-products.

9 Q. And the intended effect would  
10 be to reduce the nitrates in the plant?

11 A. Yes -- no, no.

12 Q. I mean, excuse me, in the  
13 finished product?

14 A. In the finished product.

15 Q. And you actually saw that  
16 process being used?

17 A. We never adopted it  
18 commercially, but like I say, we have a  
19 patent on it.

20 Q. I see. But did you ever see  
21 the process being experimented with?

22 A. Oh, yes. I experimented with  
23 it myself.

24 Q. What years are we talking  
25 about?

26 A. Late '70s. That's the best I  
27 can do on these dates.

28 Q. That's okay. And do you know  
29 one way or the other whether the process  
30 worked insofar as it reduced the nitrates?

31 A. Yes, it did work.

32 Q. And do you know why it was

20569

1 never used in the commercial product?

2 A. Yeah, because it smoked like  
3 hell.

4 Q. It didn't taste good?

5 A. It didn't taste as good.

6 Q. I see. It didn't taste as good  
7 as what?

8 A. As a product without it.

9 Q. Were you one who was asked to  
10 judge the taste of the product?

11 A. I was one of many, yes.

12 Q. Of many?

13 A. Yes.

14 Q. Do you know whether in fact it  
15 was smoke panels that were set up to judge  
16 the taste of that product?

17 A. I can't say with 100 percent,  
18 but I'm 95 percent that we used internal  
19 panels to screen it because we did that on  
20 all of our experiments.

21 Q. Do you know, if I wanted to  
22 talk to the person responsible for having  
23 supervised the judgment of the taste of

24           this tobacco that had been treated with  
25           the microorganisms, who would that have  
26           been?

27           A.     You'd have to go to Brown &  
28           Williamson and ask that question.

29           Q.     You don't know offhand?

30           A.     I don't know, and I don't know  
31           whether he's alive, retired or whoever it  
32           might be.

20570

1           Q.     Okay. Is it fair to say that  
2           it wasn't your job to specifically employ  
3           panels to judge the taste?

4           A.     I was not a panel organizer.  
5           Or I was a panel expert, but not an  
6           organizer or one that --

7           Q.     All right, sir.

8           A.     -- managed the panel  
9           development.

10          Q.     Are you involved in the buying  
11          of the tobacco for Brown & Williamson?

12          A.     I was not a buyer of tobacco.  
13          My job was to advise the buyers of what we  
14          wanted to put in the cigarettes.

15          Q.     I've got you. And with  
16          reference to that advice, did it -- did it  
17          have -- did you have in mind in terms of  
18          that advice the specific nicotine content  
19          that you were trying to accomplish for  
20          these tobacco products?

21          A.     Well, you keep saying specific  
22          nicotine and specific nicotine.

23          Q.     Yes, sir.

24          A.     And nicotine was only one of  
25          the minor components. What we looked at  
26          most was the smoking quality of that  
27          tobacco, of which nicotine is a small  
28          component.

29          The burnability of it, you can have  
30          something that has a 2 percent nicotine  
31          and it would smoke absolutely terrible if  
32          the other leaf characteristics are not

20571

1           good.

2           Q.     All right. Mr. Fisher, have  
3           you ever heard of the term nicotine  
4           fortification?

5           A.     Certainly.

6           Q.     In what context, sir?

7           A.     When the news media accused  
8           certain tobacco companies of fortifying  
9           cigarettes -- or fortifying tobacco with  
10          nicotine.

11          Q.     Let me ask the question with  
12          reference to the reconstituted tobacco.

13          A.     Yes.

14          Q.     Are you aware of whether there  
15          was ever any nicotine fortification in  
16          recon?

17          A.     During my 27 years at Brown &  
18          Williamson --

19          Q.     Yes, sir.

20          A.     -- there was never any nicotine

21 fortification of reconstituted tobacco.

22 Q. So during your entire  
23 employment, there was never any nicotine  
24 that was added to the recon; is that  
25 correct?

26 A. There was no nicotine added to  
27 any product in any shape or form.

28 (End of video.)

29 MR. WILLIAMS:  
30 That completes the deposition, Your  
31 Honor, and ladies and gentlemen.

32 THE COURT:

20572

1 All right. We will recess for lunch  
2 until 1:30 by the wall clock.

3 (In open court without a jury  
4 present:)

5 THE COURT:

6 Let the record reflect that the  
7 jurors left the courtroom.

8 Anything for the record by plaintiffs  
9 counsel?

10 MR. RUSS HERMAN:

11 No, Your Honor.

12 I do have one question, and that is I  
13 don't have an amendment to the list of  
14 what depos are going to be played for the  
15 remainder of the week.

16 THE COURT:

17 Nor do I, Mr. Herman.

18 MR. SCHNEIDER:

19 That was the only thing.

20 MR. RUSS HERMAN:

21 Was that the only change?

22 MR. WILLIAMS:

23 That was the only one.

24 MR. RUSS HERMAN:

25 Thank you.

26 THE COURT:

27 Defense counsel, anything for the  
28 record?

29 MR. WITTMANN:

30 No Your Honor.

31 THE COURT:

32 All right. Mr. Gianna wants to meet

20573

1 with counsel at 1:00 with regard to  
2 Dr. Burns -- Blackie.

3 THE COURT:

4 Excuse me, Dr. Blackie at 1:00 p.m.

5 We will recess at this point.

6 (Whereupon, the hearing adjourns at  
7 11:45 a.m.)

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1 REPORTER'S CERTIFICATE  
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3 I, NICHOLAS A. MARRONE, CCR, Registered  
4 Merit Reporter, do hereby certify that the foregoing  
5 proceedings were reported by me in shorthand and  
6 transcribed under my personal direction and  
7 supervision, and is a true and correct transcript,  
8 to the best of my ability and understanding.

9 That I am not of counsel, not related to  
10 counsel or the parties hereto, and not in any way  
11 interested in the outcome of this matter.

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14 NICHOLAS A. MARRONE (CCR 21011)  
CERTIFIED COURT REPORTER  
REGISTERED MERIT REPORTER

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